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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 217

MORRIS W. ZACK and SARAH ZACK,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Respondent has not attempted to meet the Petitioners' contention that there is a conflict in the Circuits as to whether the clearly erroneous rule prevents judicial review, as a question of law, of the trial court's determination of whether property is a capital asset. The Respondent has, indeed, cited several Courts of Appeals decisions,[1] including two of the Sixth Circuit, holding that

[1] The Respondent to the contrary (Respondent's Brief p. 5), we believe the Second Circuit's position is far from clear. In *Northup v.*

(Continued on next page)

the question is one of fact, subject to reversal only if the decision below is clearly erroneous. He has not denied, however, that other Courts of Appeal—the Third, Fifth and Seventh Circuits—have recently held that the question is one of "ultimate fact" subject to review free from the restraining impact of the clearly erroneous rule. (Citations on pages 10-11 of the Petition.)

In fact, the Respondent concedes the conflict exists, but in the same breath seeks to minimize the importance thereof in the following language:

> "To be sure, as taxpayer notes (Pet. 7), some of the courts have characterized the issue on review as one of 'ultimate fact', while others have labelled it simply as one of fact. But whatever the nomenclature used, they have uniformly recognized that the question is essentially factual in nature; none, so far as we are aware, has even suggested that the issue is simply one of law." (Respondent's Brief, pages 7 and 8.)

(Continued from preceding page)

United States, 2d Cir., 240 F. 2d 304, 307 (1957), the Court recently held that a similar question—i. e., whether a partial liquidation was "essentially equivalent" to a dividend involved "the application of a statutory rule to found facts" and was a "question of law"; and that "this is precisely the kind of question it is our function to decide". Nor has the Eighth Circuit fully defined its position. In both *Dillon v. Commissioner*, 8th Cir., 213 F. 2d 218 (1954)—cited by the Respondent—and *Greenspon v. Commissioner*, 8th Cir., 229 F. 2d 947 (1956), the Eighth Circuit reversed the Tax Court, not because of any claimed error in the fact findings, but because it concluded that the Tax Court had made errors of law. The citation of *King v. Commissioner*, 5th Cir., 189 F. 2d 122 (1951) is misleading because of Respondent's failure to cite five later decisions of the Fifth Circuit holding that the question is one of ultimate fact "subject to review free of the restraining impact of the so-called 'clearly erroneous rule'": *Galena Oaks Corporation v. Scofield*, 5th Cir., 218 F. 2d 217, 219 (1954); and other cases cited on page 11 of our Petition.

The Respondent cites no authority for his sweeping observation. Admittedly the question is not simply one of law. However, neither is it simply one of fact. It is, of course, necessary to find the facts. After they are found, however, the application of the law thereto clearly presents a question of law. This is not a matter of mere "labelling", as Respondent contends. There is a vast difference between "fact" and "ultimate fact". This Court has held:

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact." *Helvering v. Tex-Penn Oil Company*, 300 U. S. 481 (1937);

and

> "Finding so-called ultimate 'facts' more clearly implies the application of standards of law." *Baumgartner v. United States*, 322 U. S. 665 (1944).

It is respectfully submitted that in holding that the question whether property is a capital asset is one of fact which may not be reviewed as a question of law, free of the restraining impact of the clearly erroneous rule, the Courts of Appeal for the Sixth, Ninth and Tenth Circuits have failed to observe the vital distinction between "fact" and "ultimate fact" pointed out by this Court (in the above cited cases) and expressly observed by the Courts of Appeal for the Third, Fifth and Seventh Circuits in capital asset cases.

The announced difference in opinion as to the appellate function in this kind of case no doubt produces real differences in results. It is unlikely to have been mere coincidence that an examination of the reported cases for the last seven years discloses no reversal by the Sixth Circuit in a capital asset case. We have cited on pages

10-11 and 20-23 of our Petition six capital asset cases decided by the Third, Fifth or Seventh Circuits in the last two years that were reversals of the trial court. We do not mean to suggest that the Sixth Circuit may not on the merits have been justified in affirming every such case in the seven year period. We do submit, however, that there may well have been a connection between the restricted view it takes of the appellate function in this kind of case and its unbroken record of affirmances in that period.

The Respondent states that "* * * because of the factual nature of the question the Government has refrained from seeking certiorari in those [cases] decided adversely to it". (Respondent's Brief, page 6.) In support of that statement, the Respondent cites four recent Court of Appeals' decisions—two each from the Third and Fifth Circuits—decided against the Respondent. In each of these cases the Court of Appeals *reversed* the Tax Court.

The Respondent thus takes the extreme, and, we submit, untenable position, that the propriety of a reversal by a Court of Appeals of the Tax Court presents a question of fact. While the Respondent might possibly refrain from appealing to a Court of Appeals a decision of the Tax Court adverse to him because of his belief that the question is always one of fact, that should not restrain him in a proper case from seeking certiorari as to decisions of the Courts of Appeals reversing the Tax Court on the ground that the question is not one of fact, but one of law.

Moreover, three of the four decisions so cited by the Respondent, *Philber Equipment Corp. v. Commissioner*, 3rd Cir., 237 F. 2d 129 (1956), *Goldberg v. Commissioner*, 5th Cir., 223 F. 2d 709 (1955), and *Curtis Co. v. Commissioner*, 3rd Cir., 232 F. 2d 167 (1956), (discussed on pages 10 and 11 of the Petition) hold that the question pre-

sented is one of law rather than of fact. One would think that such holdings, contrasted with the Respondent's success in convincing the Sixth, Ninth and Tenth Circuits that the question is one of fact, might induce him to seek certiorari to resolve the conflict on this important and recurring question.

The Respondent has stated, however, that he will not seek certiorari in capital asset cases, whether the Court of Appeals affirms the trier of facts against the Government, or the Court of Appeals reverses the trier of facts against the Government. It follows therefrom, that if the clear conflict between the Courts of Appeals on the scope of their power is to be resolved, it will, it is respectfuly submitted, be in a case where this Court grants a taxpayer's petition.

The Respondent makes the following statement:

> "Moreover, in view of the wide variations in 'factual' content of so-called 'capital-gain and loss cases' (Pet. 8), some 'diversity' of views regarding the scope of review in such cases would appear not only inevitable but also appropriate; no single formula can be applied across the board to so broad a category of tax litigation." (Respondent's Brief, page 8.)

We do not agree. It is neither inevitable nor appropriate that there be diversity in views regarding the scope of review. It is not appropriate for the Courts of Appeals of three circuits to hold that the question is one which cannot be reviewed free of the restraining impact of the clearly erroneous rule, and for the Courts of Appeals of three other circuits to hold exactly the opposite. On this question there is only one appropriate view, and we respectfully submit that this Court should grant the Petition to resolve the question and to decide which view is the correct one.

During the year 1956 the Courts of Appeals handed down approximately 18 reported decisions involving the question of whether or not a lower court had committed error in a case involving the capital asset definition. It is, therefore, apparent that the question of what is a capital asset is constantly before the Courts of Appeals.

In view of the clear conflict of opinion as to the appellate function in this recurring and important category of cases between the Courts of Appeals of the Sixth, Ninth and Tenth Circuits, on the one hand, and of the Third, Fifth and Seventh Circuits, on the other hand, it is respectfuly submitted that the Petition should be granted.

Respectfully submitted,

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